

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 24 of 2003

Sou.Jayshri Jayasingrao Zite ..Appellant

V/s

Smt.Parvatibai Piraji Mane and Ors..Respondents

Shri V.B.Naik for Appellant

Shri P.R.Arjunwadkar for Respondents

CORAM:S.R.SATHE, J.

DATED:22nd June 2005

P.C.:-

1. Heard both the learned Advocates.

2. The Appellant-original plaintiff had filed suit for possession of encroached land admeasuring 53 x 10 ft. out of CTS No.912/9B against the defendant. The defendant contended that the said land forms part and parcel of his land bearing CTS No.712/9A which is adjacent to the plaintiffs' land and same is owned and possessed by him. Both the parties adduced oral and documentary evidence. After considering the same the trial Court dismissed the plaintiff's suit holding that the plaintiff has failed to prove the alleged

encroachment. Decision of the trial Court was confirmed by the first appellate Court.

3. Being aggrieved, the original plaintiff filed the present Second appeal. Shri V.B.Naik, learned Advocate for the original plaintiff submitted that substantial question of law that arises in the present appeal is whether the courts below were justified in dismissing the suit regarding encroached portion when course of appointing the Commissioner under Order 26 rule 9 of Code of Civil procedure and the first appellate Court should have in fact remanded the matter. From perusal of the judgments of both the courts below it is very clear that though the plaintiff filed suit for possession of particular encroached portion she did not adduce sufficient evidence to prove the alleged encroachment. The plaintiff had produced one map at Exh.32 to show the exact location of the plaintiffs and defendants property. However the boundary of the suit property shown by the plaintiff in the plaint and boundary shown in the said map do not tally. Moreover, it was in fact very easy for the plaintiff to appoint the City Survey Officer and get both the properties measure and find out whether there is any encroachment made by the defendant in plaintiff's property bearing Survey NO.712/9B. However, the plaintiff did not adduce any such evidence. Admittedly, the defendant had constructed his house in the suit property some time in the year 1976 and the plaintiff has purchased his property bearing NO.712/9B in the year

1989. The plaintiff has also failed to adduce any evidence to show that the defendant made encroachment at a particular time. Thus both the courts below recorded finding of fact that the plaintiff has failed to prove the alleged encroachment. There is nothing to indicate that the said finding is perverse or that the said is against the evidence on record.

4. Though it is true that under Order 26 Rule 9 of Civil Procedure Code the Court can appoint Commissioner as to determine the encroached portion alleged by the plaintiff, it must be said that the Court was not under obligation to appoint such Commissioner particularly when there was no prayer to that effect made by either side at any time and the plaintiff who was supposed to lead best evidence to prove her case had failed to do so. Thus it is very clear that no substantial question of law is involved in the matter.

5. Hence the appeal is dismissed in limine.

(S.R.SATHE, J.)